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IN THE

Supreme Court of the United States

October Term, 1974 No. 74-343

BRUCE AGNEW, *Petitioner*

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Bruce Agnew, Petitioner, by and through his attorneys, Samuel J. Hecht, Esquire and Neil E. Jokelson, Esquire, respectfully requests that a Writ of Certiorari be issued to review the judgment order of the Court of Appeals for the Third Circuit affirming the judgment and commitment of the appellant, said order of the court having been entered on August 27, 1974.

OPINIONS BELOW

The judgment order of the Court of Appeals for the Third Circuit denying the appeal from and affirming the sentence of the United States District Court for the Eastern District of Pennsylvania is unreported and is attached as

Appendix "A". The opinion of the United States District Court for the Eastern District of Pennsylvania is attached as Appendix "B". This latter opinion is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit denying the appeal from and affirming the sentence of the United States District Court for the Eastern District of Pennsylvania was entered on August 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTION INVOLVED

Where the Government has not proven nor attempted to prove any specific prejudice, should not an accused who has entered a guilty plea to a criminal charge be allowed to freely withdraw his plea of guilty prior to being sentenced, where he demonstrates that he was not advised of all possible defenses to the criminal charge prior to the entry of his plea of guilty?

CONSTITUTIONAL AND FEDERAL RULE PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ..."

Rule 32(d) of the Federal Rules of Criminal Procedure provides that: "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

STATEMENT OF THE CASE

Petitioner, Bruce Agnew, entered a plea of guilty to violation of Title 18, U.S.C., Appendix 1202(a)(1) in the United States District Court for the Eastern District of Pennsylvania.

Petitioner was specifically charged with knowingly and unlawfully receiving a 12 gauge shotgun in interstate commerce, the petitioner having been previously convicted of a felony by the Common Pleas Court of Philadelphia County, Commonwealth of Pennsylvania.

The entry of the plea of guilty was done without the advancement of any promises by way of sentencing other than the agreement by the Government to drop the first count of the two count indictment.

Thereafter, petitioner discharged the attorney who represented him at the time that he entered his plea of guilty and retained his present counsel. Prior to sentencing, the appellant sought leave to withdraw his guilty plea as aforementioned, alleging *inter alia*, that he was not aware of certain technical defenses to the *malum prohibition* crime with which he was charged. The trial court denied this motion and sentenced the petitioner to a term of imprisonment and a fine.

On appeal to the Court of Appeals for the Third Circuit, the Court of Appeals, by a judgment order, affirmed the judgment of sentence of the District Court without opinion but did refer to the memorandum opinion of the trial court which is reproduced in the appendix. This petition followed.

REASONS FOR GRANTING THE WRIT

This appeal raises as an issue of first impression in this Honorable Court, the question as to whether defendant, who has pled guilty to a criminal offense, may withdraw his plea of guilty prior to sentencing, pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. This is especially noteworthy when as here, the defendant was not aware at the time that he entered his guilty plea, what technical defenses were available to him in a crime which did not require a *mens rea*.

This Honorable Court has on prior occasions, most notably in *McMann v. Richardson*, 397 U.S. 759, 1970, and *Brady v. United States*, 397 U.S. 742, addressed itself to the circumstances under which a defendant would be allowed to withdraw a plea of guilty *after* sentencing. This Court, however, has never considered the question, which is both of constitutional dimension and which is interpretive of Rule 32(d) of the Federal Rules of Criminal Procedure of under what standards a plea of guilty, entered prior to sentencing, should be allowed to be withdrawn upon application by the defendant, since the enactment of Rule 32(d). But see *Kercheval v. United States*, 274 U.S. 220 (1927), which sets forth constitutional standards for the allowing of a withdrawal of guilty plea prior to sentencing. *Kercheval* pre-dates the promulgation of Rule 32(d) in 1946.

As a result of the failure of this Court to address itself to that issue, the law in the area has not been settled and accordingly, persons in the same circumstances have been dealt with under conflicting standards as formulated by the various circuit courts of appeals.

These contrary views have been set forth in Professor Wright's *Federal Practice and Procedure*, Section 538. Professor Wright concludes that:

> It would seem that sounder view, supported by the language of the rule and by the reasons for

> it, would be to allow withdrawal of the pleas prior to sentencing unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

See also Annotation, *Withdrawal of Plea of Guilty of Nolo Contendere, before Sentence, under Rule 32(d) of Federal Rules of Criminal Procedure*, 6 A.L.R. Federal 665 et seq. and the cases cited therein.

While it has been generally held that Rule 32(d) does not confer an absolute right to withdrawal of a guilty plea prior to sentencing, the considerations governing the withdrawal of a plea have been differently weighed by the lower courts which have considered the question. Specifically, in *United States v. Giuliano*, 348 F.2d 217 (2nd Cir. 1965), the Court placed the burden of establishing grounds for the withdrawal of the plea upon a defendant who seeks to withdraw his guilty plea prior to sentencing. Similarly, the Court of Appeals for the Third Circuit in *United States v. Ptomey*, 366 F.2d 759 (3d Cir. 1966), declared that no court had suggested that a withdrawal of a plea of guilty, prior to sentencing, should be denied if the defendant knew and understood what was being done and understood the consequences of his plea. Conflicting with this view is the opinion also expressed by the Third Circuit Court of Appeals in *United States v. Stayton*, 408 F.2d 559 (3rd Cir. 1969), wherein it was suggested that the Government must prove that it is prejudiced by the withdrawal of plea before a motion to withdraw a plea prior to sentencing can be denied. As the Court in *Slayton* stated;

> In aid of the protection of the right to trial, Rule 32(d) of the Federal Rules of Criminal Procedure, in effect establishes two separate standards for the allowance of the withdrawal of guilty pleas:
>
> '(d) A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence

is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.'

One standard is to be applied on a motion for withdrawal of a guilty plea made before the imposition of a sentence; another is to be applied when the motion is made following sentence.

In order to avoid motions for withdrawal based on dissatisfaction with a sentence, once imposed, the Rule requires that post-sentence motion should be denied unless manifest injustice to the defendant will result: *Sullivan v. United States*, 348 U.S. 170, 175, 75 S.Ct. 182, 99 L.Ed. 210 (1954); *United States v. Washington*, 341 F.2d 277, 281 (3rd Cir.), cert. denied sub nom., *DiGregory v. United States*, 282 U.S. 850, 86 S.Ct. 96, 15 L.Ed. 2d 89 (1965); *United States v. Shneer*, 194 F.2d 598 (3rd Cir. 1952).

In weighing motions for withdrawal of a guilty plea before sentencing, the test to be applied by the trial courts is fairness and justice. Though not expressly stated in Rule 32(d), this standard was articulated by way of dictum in *Kercheval v. United States*, 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927): 'The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just . . . (Emphasis added). *Kercheval* was decided before the adoption of the Federal Rules of Criminal Procedure, but the quoted standard has continued as the guide-line for judicial disposition of a presentence motion to withdraw a plea of guilty: *Nagelberg v. United States*, 106 U.S. 266, 84 S.Ct. 1252, 12 L.Ed. 2d 290 (1964); *Gearhart v. United States*, 106 U.S. App. D.C. 270, 272 F.2d 499, 502 (1959); *United States v. Nigro*, 262 F.2d 783, 787 (3rd Cir. 1959); *Everett v. United States*,

> 119 U.S. App. D.C. 60, 336 F.2d 979, 985 (1964) (dissenting opinion by Judge Wright.)
>
> This does not mean that every motion for withdrawal before sentence should be granted. There is no absolute right to withdraw a guilty plea, and the right to do so is within the sound discretion of the trial court; *Nagelberg v. United States*, supra; *Burnett v. United States*, 404 F.2d 29 (10th Cir. 1968); *United States v. Ptomey*, 366 F.2d 759 (3rd Cir. 1966); *United States v. Washington*, supra, 341 F.2d at 281; *Everett v. United States*, supra, 336 F.2d at 983; *United States v. Colonna*, 142 F.2d 210 (3rd Cir. 1944). If the government can show substantial prejudice, then the motion, in the trial court's discretion, may be denied.

These principles set forth in *Stayton* were not conformed with by the Court of Appeals for the Third Circuit in the instant case, as indicated by its reliance upon the opinion of the lower court, which is found in the appendix to this Petition.

Finally, at all stages in the courts below following the entry of his plea, petitioner, seeking to withdraw his plea, took the position without contradiction that at the time that he entered his guilty plea, he did not have a complete understanding of the charge against him and of possible defense which he may have had to such charges but which he abandoned at the time that he entered his plea of guilty. At the hearing to withdraw his plea of guilty, counsel who represented petitioner at the time that he entered his guilty plea, stated that he himself was somewhat unclear as to whether the petitioner could raise a defense to the charge that at the time petitioner purchased the shotgun from a registered gun shop, he did not know that such a purchase was a criminal act and that he had no intention to deceive anyone. Although counsel explained to the petitioner that in his belief, knowledge of the criminal act was not a requisite part

of the Government's case to prove the second count of the indictment, he also explained to him in apparent contradiction that "this was a question for a jury to determine whether or not they believed Mr. Agnew or whether they didn't believe him as far as that particular aspect was concerned." (See p. 44 N.T. of hearing on petitioner's petition to withdraw guilty plea.) These irreconcilable statements could only have caused confusion in petitioner's mind concerning his possible defenses.

Similarly, petitioner, prior to his entering his plea of guilty, was not made aware of the existence of the material that in order for it to prove its case, the Government must show that the shotgun which petitioner purchased moved within interstate commerce. This of course goes to a material element of the crime, but petitioner was never advised of same. (See p. 9 N.T. of hearing on petitioner's petition to withdraw guilty plea.) Accordingly, petitioner's plea of guilty was as a matter of law never knowingly and intelligently made with awareness of the defenses available to him. This issue was never addressed by either of the lower courts in their opinions, although petitioner raised this issue when he petitioned to withdraw his guilty plea and maintained this issue during the proceedings below.

In such circumstances, this Honorable Court would serve the public interest by addressing itself to the question of first impression concerning a definitive interpretation of Rule 32(d) of the Federal Rules of Criminal Procedure with its attendant constitutional gloss and a matter of individual justice to the petitioner to review the opinion of the lower courts.

CONCLUSION

For the above reasons, the petitioner, Bruce Agnew, respectfully requests that this Honorable Court issue a Writ of Certiorari for review of the judgment order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

Samuel J. Hecht
Neil E. Jokelson
Attorneys for Petitioner

APPENDIX A

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 74-1220

UNITED STATES OF AMERICA

v.

BRUCE AGNEW, *Appellant*

(D. C. Crim. No. 73-129)

Appeal from the United States District Court for the Eastern District of Pennsylvania.

Argued August 22, 1974

Before VAN DUSEN, WEIS and GARTH,
Circuit Judges

Neil E. Jokelson, Esq.,
Philadelphia, Pa.,
Attorney for Appellant

Robert E. J. Curran, *U.S. Attorney;*
Kenneth R. Dixon, *Assistant U.S. Attorney;*
Philadelphia, Pa.,
Attorneys for Appellee

JUDGMENT ORDER

After consideration of appellant's contention that it was error for the district court to refuse leave to the appellant to withdraw his guilty plea prior to the sentencing of appellant,

It is ADJUDGED AND ORDERED that the September 26, 1973, judgment and commitment (filed February 21, 1974) is affirmed. See *United States v. Agnew*, Memorandum Opinion of September 26, 1973 (E.D. Pa. Crim. No. 73-129, Transcript of 9/26/73 at N.T. 54-57, reproduced at 91a-94a).[1]

BY THE COURT:

Circuit Judge

Dated: August 27, 1974

Attest:

Thomas F. Quinn, *Clerk*

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1. In addition to the cases cited in the above Memorandum Opinion, see *United States v. Stayton*, 408 F.2d 559, 562 (3d Cir. 1969). See also 62a-63a, 77a-85a; *cf. United States v. Ptomey*, 366 F.2d 759 (3d Cir. 1966).

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. Criminal No. 73-129

BRUCE AGNEW

MEMORANDUM OPINION DICTATED FROM THE BENCH BY HIGGINBOTHAM, J.

(This Memorandum Opinion, was dictated from the bench and for grammatical purposes and accuracy of citations has been reviewed by the Court to more extensively discuss the rationale of the cases which were cited from the bench.)

THE COURT: The basic cases which I find persuasive in articulating the guidelines under which a Court must evaluate a motion to withdraw a guilty plea are Woodward v. United States, 426 F.2d 959; The United States v. Young, 424 F.2d 1276; the United States ex rel. Culbreath v. Rundle, 466 F.2d 730.

I start out in this case recognizing that the rule relating to acceptance of a guilty plea is designed to assure that a Defendant who pleads guilty does so voluntarily, knowingly, and intelligently. It requires the Court to determine that the Defendant's plea was voluntarily, knowingly, and intelligently entered.

I also start out by recognizing that greater liberality due a motion filed prior to sentencing. See United States v. Young, supra.

Yet even within this context of liberality in favor of a Defendant the Court of Appeals noted that in some factual situations a trial Judge has some discretion in ruling on a request to retract a plea of guilty; otherwise there would be an absolute right for any Defendant to withdraw any and every guilty plea prior to sentencing.

In the United States v. Ptomey, 366 F.2d 759, the Court of Appeals held that if a Defendant knew and understood what was being done and there was not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights in understanding the consequence of his plea then it is appropriate for a District Court to deny the right to withdraw, or at least it is not an abuse of discretion to deny the withdrawal.

On the record in this case this Defendant was fully knowledgeable of all the defenses in this case. He had one of the most able lawyers in the State to represent him. He had total effective assistance of counsel. To grant the withdrawal of the plea on the facts of this case would be to announce a new doctrine which would give carte blanche options to a Defendant to withdraw a plea at any time before sentencing unless the Government can show manifest prejudice. Such a rationale would sanction gamesmanship whereby when the witnesses are in Court to present the Government's case a Defendant could first avoid facing the hard evidence of trial by pleading guilty, then later at his whim as a matter of right he could let a season pass (as did this Defendant) and on the day of sentencing (as did this Defendant) for the first time initiate the process to withdraw the guilty plea and get a trial. Such intentional gamesmanship does not improve the administration of our criminal justice, but to the contrary, if sanctioned on the facts of this case, it deters the prompt and fair administration of the criminal justice system. There must be some concern for finality in the criminal justice system. Otherwise, we are pronouncing rules which cause neither finality nor justice.

I was prepared to go to trial in June. I recall this case quite clearly. We rearranged our schedules two or three times. We had several witnesses here available.

The withdrawal of this plea, in my opinion, if granted, as a matter of right, would make guilty pleas a tenuous response which, in effect, merely becomes a continuance so that a Defendant may at a later date reopen the litigation.

None of the defendant's rights have been abused. He was neither uninformed nor stupid, but rather has been cagey and savvy. The prerequisites of the present case law have been fully complied with.

The motion to withdraw the plea is denied, and I am ready to proceed with sentencing.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-343

BRUCE AGNEW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in denying his motion to withdraw his guilty plea prior to the imposition of sentence.

Petitioner, a previously convicted felon, was indicted on one count of procuring a firearm by fraudulent representations, in violation of 18 U.S.C. 922(a)(6), and on one count of receiving a firearm in interstate commerce, in violation of 18 U.S.C. App. 1202(a)(1). Following an unsuccessful attempt to suppress damaging evidence, petitioner, on advice of counsel, entered a plea of guilty on the second count. After conducting a careful examination pursuant to the requirements of Rule 11, the court accepted his plea (App. 31a-34a).[1] As the sole condition of the plea, the govern-

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[1]"App." refers to petitioner's appendix filed in the United States Court of Appeals for the Third Circuit.

ment agreed to withdraw the first count of the indictment. Sentencing was deferred pending completion of a presentence investigation.

Petitioner thereafter discharged the attorney who had represented him at the time his plea was entered and retained other counsel. On the day he was to be sentenced, petitioner for the first time moved to withdraw his guilty plea. The motion was predicated on the claim that petitioner was not aware of certain defenses at the time his plea was entered (App. 8a-9a, 61a-63a). There followed a hearing on the motion. Under examination by the court, petitioner admitted that he knew when he entered his plea on the second count that, if the court accepted it, the first count of the indictment would be withdrawn. He also admitted that he had expressed no dissatisfaction with his former counsel (App. 63a-66a). Petitioner also stated that his plea had been voluntarily entered (App. 69a). Petitioner's former attorney testified that he had discussed various defenses with petitioner (App. 80a-82a):

> A. * * * [W]hen he first got arrested and I got the indictment I discussed with him the entire incident out of which this indictment arose, and Mr. Agnew had indicated to me that he didn't know he had done anything wrong; * * * but it was still my belief based on my understanding of the statute as to the second count that knowledge wasn't necessary, and I also explained to him that this was a question for a Jury to determine whether or not they believed Mr. Agnew or whether they didn't believe him as far as that particular aspect was concerned.
>
> Q. Did Mr. Agnew at any time express or indicate dissatisfaction with your services as his attorney on this matter?
>
> A. No.

* * * * *

Q. [By Petitioner] And when you discussed the possible defenses of the case with him, what defenses did you allude to?

A. We discussed the possibility of, well, no knowledge. The fact that he didn't know what he was signing. The fact that he had no intention to knowingly sign—to purchase this gun or deceive the dealer into selling him the gun not knowing that he had been convicted of a crime carrying a maximum of one year or more in prison.

Q. Did you discuss any other defenses with him?

A. I discussed with Mr. Agnew that it was also incumbent on the Government not only to show that he had signed the application to buy the gun, but it also was incumbent on the Government to prove that he in fact had been convicted * * *.

At the close of the hearing the court denied petitioner's motion to withdraw his guilty plea (Pet. App. B). Petitioner was sentenced to a term of 15 months' imprisonment and fined $2,000. The court of appeals affirmed (Pet. App. A).

Petitioner contends that the trial court erred in denying his motion to withdraw the guilty plea. The record indicates, however, that petitioner entered the guilty plea voluntarily and with full appreciation of the consequences. Moreover, petitioner was apprised of the possible defenses that existed.[2]

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[2]Petitioner alleges that he was not informed of the "defense" that the gun which he purchased had not moved in interstate commerce. This is not a defense, however. It constitutes an essential element of the crime under 18 U.S.C. App. 1202(a)(1), which was alleged in the indictment (App. 4a-5a) and upon which the government bore the burden of presenting evidence had the case reached trial.

The decision whether to allow withdrawal of a guilty plea before sentencing is fully within the district court's sound discretion.[3] *United States* v. *Valdez*, 450 F.2d 1145 (C.A. 5); *Meaton* v. *United States*, 328 F. 2d 379, 380 (C.A. 5), certiorari denied, 380 U.S. 916. Here, where petitioner entered his plea voluntarily and was fully apprised of his possible defenses, the court did not abuse its discretion by refusing to allow him to withdraw his plea.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[3]Petitioner's reliance upon *United States* v. *Stayton*, 408 F.2d 559 (C.A. 3), is misplaced. *Stayton* merely required that a motion to withdraw a guilty plea be granted when "fair and just," but recognized that the defendant retained the burden of establishing grounds for withdrawal of a plea. *Id.* at 561-562 n.6. See also *United States* v. *Webster*, 468 F.2d 769, 771 (C.A. 9), certiorari denied, 410 U.S. 934.